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No. 04-1374

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2004

CITY OF HEMET, DAVE QUINN, AARON MEDINA, DANIEL REINBOLT, NATE MILLER, PETER HEWITT, and HEMET POLICE DEPARTMENT,
Petitioners,

vs.

THOMAS SMITH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S OPPOSITION TO PETITIONERS' WRIT OF CERTIORARI

Respondent Thomas Smith submits this brief in opposition to the petition for writ of certiorari filed by petitioners City of Hemet, Dave Quinn, Aaron Medina, Daniel Reinbolt, Nate Miller, Peter Hewitt, Lee Evanson and the Hemet Police Department.

Regarding summary judgment in petitioners' favor based on this Court's decision in *Heck v Humphrey*, 512 U.S. 477 (1994), petitioners concede that the court of appeals' decision does not conflict with the decision of any other circuit. Nor does the court of appeals' application of *Heck* raise any unresolved issue of national importance. Instead, petitioners simply argue that the Ninth Circuit misapplied a "properly stated rule of law" which, as this Court knows, is not a basis for granting review. SUP. CT. R. 10.

The petition is premature with respect to all three "use of force" issues listed because the *en banc* panel remanded the case to the district court to determine them. Thus, there is no final decision on these issues for this Court to review making this case an inappropriate vehicle for this Court to decide the issues presented by petitioners. Regardless, the claimed conflicts in the circuits do not exist and there is no need for High Court intervention.

Furthermore, petitioners misstate the *en banc* decision. The court of appeals did not establish a new substantive test for excessive force claims; it simply found that consideration of less injurious means for arresting a suspect may be relevant under the "objective reasonableness" standard of *Graham v. Connor*, 490 U.S. 386 (1989). Contrary to petitioners'

argument, the *Graham* analysis has never been limited to three factors; the factfinder must look to the totality of circumstances to determine whether a particular use of force was reasonable.

As to the issue of the definition of "deadly force" under *Tennessee v. Garner*, 471 U.S. 1 (1985), the *en banc* decision adopted the definition used by other circuits that have addressed the issue, which is the definition used by police departments across the country, the United States Department of Justice, *and* the Hemet police department.

Finally, petitioners also seek an advisory opinion from this Court that the use of a police dog to maul a suspect can *never* be considered "deadly force" under *Tennessee v. Garner*. Such an opinion would be premature in the procedural posture of this case and would be inconsistent with existing case law in the circuit courts. The *en banc* decision does not resolve this issue; it merely remands the issue for resolution on a full evidentiary record.

STATEMENT OF THE CASE

A. Statement of Facts

The facts about what petitioners knew upon arriving at respondent's home are largely undisputed. In the evening hours of August 16, 1999, respondent's wife, Cynthia Smith, called the Hemet police, complaining that her husband Tom was " 'hitting her and/or was physical with her.' " When asked if there were weapons Mrs. Smith said no, and further stated that her husband was in pajamas. 394 F.3d at 693 (Pet. App. 3).

Upon the first officer's arrival he began ordering Mr. Smith to take his hands out of his pockets and come off the porch. Mr. Smith refused; he cursed and demanded that the

officer approach him. Other officers arrived, including the dog handler Quinn. The officers gave more commands, one of which Mr. Smith finally obeyed (he took his hands out of his pockets), others of which he disobeyed – he did not put his hands on his head, did not walk towards the officers, and did not turn around. 394 F.3d at 693-94 (Pet. App. 3-4).

Quinn warned Mr. Smith that the dog may be used and may bite him; Smith, though, still did not obey commands. Finally, after Mr. Smith had refused to obey the dog handler Quinn's final commands, Quinn sprayed Mr. Smith with oleoresin capsicum aka pepper spray, a painful and sometimes dangerous weapon.[1] Mr. Smith swore and tried, unsuccessfully, to enter the house. Officers came up on the porch, slammed Mr. Smith against the door, threw him down on the porch. At about the same time, in response to Quinn's command the dog began attacking Mr. Smith. The dog bit him on his shoulder and neck, finally sinking its teeth into his arm. 394 F.3d at 694 (Pet. App. 4).

With four officers on Mr. Smith and the dog biting him, Mr. Smith finally agreed to comply with the officers' commands. He remained, though, on the ground, curled up with one of his hands tucked away out of the officers' view, in an effort to protect himself from the dog. Quinn ordered the dog to bite again; the dog bit Mr. Smith's left side and shoulder. Officers dragged Mr. Smith off the porch where the dog bit him a third time on Quinn's command as Mr. Smith was shielding his arm from the dog. During all this, the officers sprayed Mr. Smith with pepper spray at least four times – two sprayings occurred before the dog attack and at least one afterwards when Mr. Smith was pinned to the ground. The

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[1] *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1200 n. 7 (9th Cir. 2000), *vacated and remanded on other grds.*, 534 U.S. 801 (2001), *reinstated* 276 F.3d 1125 (9th Cir. 2002).

officers handcuffed Mr. Smith, and sprayed his eyes with water (supposedly to wash out the pepper spray). Paramedics arrived to treat his dog bite injuries. 394 F.3d at 694 (Pet. App. 4-5).

Following his arrest, Mr. Smith was charged with two misdemeanor counts: violations of Cal. Penal Code § 148 (resisting, delaying an officer), and Cal. Penal Code § 243(e) (battery on a spouse). He pled guilty to both counts. 394 F.3d at 694 (Pet. App. 5-6 & n.2).

B. Procedural History

Respondent filed suit under 42 U.S.C. § 1983, alleging that petitioners used excessive force in violation of the Fourth Amendment during the course of his August 16, 1999 arrest. Defendants – petitioners in this Court – were the City of Hemet, the Hemet Police Department, and Hemet Police Officers Dave Quinn, Nate Miller, Aaron Medina, Daniel Reinbolt, and then Hemet Police Chief Peter Hewitt. 394 F.3d at 694-95 (Pet. App. 6).

Defendants moved for summary judgment. Defendants asserted various grounds, including qualified immunity and a claim that the action was barred by plaintiff's guilty plea to violating Cal. Penal Code § 148, resisting/delaying an officer. *See Heck v. Humphrey*, 512 U.S. 477 (1994). The trial court agreed based on *Heck*, and dismissed the action. 394 F.3d at 695 (Pet. App. 6).

The initial Ninth Circuit panel, in a 2-1 decision, affirmed based on *Heck*. The majority concluded that since an officer does not act lawfully when he uses excessive force, success on Mr. Smith's § 1983 suit should imply that his Cal. Penal Code § 148 conviction was invalid. Pet. App. 44-46. The Ninth Circuit granted rehearing *en banc* and, in an 8-3 decision, concluded that given the breadth of Cal. Penal Code § 148 *and* petitioners' concession that Mr. Smith violated § 148

before any officer used force, success on the § 1983 suit would not "necessarily imply" that the § 148 conviction was invalid. 394 F.3d at 695-99 & n.3 (Pet. App. 7-13 & n.3). The *en banc* panel rejected petitioners' alternative argument that summary judgment should be affirmed because the force was reasonable as a matter of law. 394 F.3d at 700-04 (Pet. App. 17-24). The *en banc* panel also took the occasion to conform Ninth Circuit law with that in other circuits defining "deadly force," and adopted the definition used by other circuits, federal and state law enforcement, and petitioners themselves. 394 F.3d at 704-07 (Pet. App. 25-30).

REASONS FOR DENYING THE PETITION

I. THE *EN BANC* DECISION IS NOT IN CONFLICT WITH *HECK V. HUMPHREY* OR THE DECISIONS OF OTHER CIRCUITS, AND TURNS ON AN INTERPRETATION OF CALIFORNIA LAW RATHER THAN AN UNRESOLVED ISSUE OF NATIONAL IMPORTANCE.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court held that where success on a suit under 42 U.S.C. § 1983 lawsuit would "necessarily" imply that a criminal conviction was invalid – a conviction has not been expunged or overturned – then the § 1983 lawsuit was barred. In short, a litigant cannot use the § 1983 lawsuit to collaterally attack the criminal conviction. 512 U.S. at 486-87.

An easy application of this rule was in *Heck*. There, the § 1983 plaintiff was in jail, having been convicted of manslaughter. He sued the prosecutors and their investigator under § 1983, claiming they had suppressed and destroyed evidence which would have prevented his conviction and

imprisonment. Obviously, success on the § 1983 suit would necessarily imply that the plaintiff's valid criminal conviction was invalid.

Heck's rule can also apply to a Fourth Amendment false arrest claim. In footnote 6, using an example based on New York state law, Justice Scalia described how a plaintiff who has been convicted of resisting a ***lawful*** arrest, cannot thereafter sue under § 1983 claiming he was seized in violation of the Fourth Amendment. After all, a seizure in violation of the Fourth Amendment is "necessarily" inconsistent with a *lawful* arrest. 512 U.S. at 487 n.6

But *Heck's* rule does not and cannot apply to a case where a plaintiff sues under § 1983 claiming excessive force, where the excessive force occurs *after* the criminal conduct for which the plaintiff was convicted. Take the facts of *Tennessee v. Garner*. Edward Garner burglarizes the home. The officer arrives but Garner runs away with the officer giving chase. The officer orders Garner to stop or he will shoot. Garner doesn't stop; he keeps running. In response, the officer shoots Garner. Garner violated Cal. Penal Code § 148.[2] He knowingly disobeyed the officer's commands to stop; at the same time the officer was acting lawfully in giving those commands. But assuming Garner was later convicted of violating § 148, that

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[2] California's "resisting arrest" statute – Cal. Penal Code § 148 – is not limited to arrests; it covers *any conduct* that "resists, delays, or obstructs [the police officer] . . . in the discharge or attempt to discharge *any* duty . . ." (emphasis added). As explained by one California court: "[Section 148] not only proscribes resisting arrest, but [] also limits other forms of hindering a police officer or other public official from executing the duties of his or her office." *People v. Lopez*, 188 Cal. App. 3d 592, 599 (1986). Consequently, unlawful resistance or delay has been found in instances before an officer used any force, and in instances where no arrest was even contemplated or force used. *In re R*, 12 Cal. App. 3d 80, 86 (1970) (juvenile properly convicted for violating § 148 when he interfered, through verbal harassment, with officers' questioning of others); *People v. Cooks*, ___ Cal. App. 2d Supp. ___, 58 Cal. Rptr. 550, 552 (1967). (Conviction of bartender who urged non-cooperation with police.).

conviction could not bar him from suing for excessive force. Put differently, Garner could not defend against the § 148 charge based on his flight by claiming the officer used unlawful deadly force in shooting him. Garner's § 148 violation – his flight – was complete upon his refusal to stop when told to do so. Thus, success on his § 1983 claim would not "necessarily imply" that his § 148 conviction was invalid.

To further illustrate the correctness of the *en banc* decision, assume that instead of the officers siccing a dog on Tom Smith, knocking him down, and macing him, the officers simply stepped on the porch, grabbed Mr. Smith's arms, and handcuffed him. Had that occurred Mr. Smith would still be guilty of violating Cal. Penal Code § 148. He delayed the officers in the lawful performance of their duties by (a) refusing to put his hands on his head, (b) refusing to turn around, and (c) refusing to step off the porch. *People v. Roberts*, 131 Cal. App. 3d Supp. 1 (1982) (defendant convicted of violating Penal Code § 148 by interfering with officers through cursing, verbal threats, and stepping between officer and driver); *see also* fn. 2, *supra*.

Hence, because the evidence established that Mr. Smith violated § 148 before any officer touched him or used any force against him, 394 F.3d at 697 & n.3 (Pet. App. 11 n.3) (dog handler Quinn admits Mr. Smith violated § 148 before any officer used force), a finding that the officers used excessive force does *not* "*necessarily* imply" that Mr. Smith's Penal Code § 148 conviction was invalid.

The *en banc's* reasoning follows that employed by other circuits in applying *Heck*. The circuits have found that, given the facts before the courts, convictions for crimes generically labeled "resisting arrest" are not "necessarily" called into question by § 1983 actions alleging excessive force: *Willingham v. Loughnan*, 261 F.3d 1178, 1183 (11th Cir.

2001), *cert. granted and judgment vacated on other grds.*, 537 U.S. 801(2002); *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1127 (10th Cir. 1999); *Nelson v. Jashurek*, 109 F.3d 142 (3d Cir. 1997). The *en banc* decision is also consistent with the Ninth Circuit's earlier decision in *Sanford v. Motts*, 258 F.3d 1117, 1119-20 (9th Cir. 2001) ("Hence, if [Officer] Motts used excessive force subsequent to the time Sanford interfered with his duty [in violation of Cal. Penal Code § 148], success in her section 1983 claim will not invalidate her conviction. *Heck* is no bar.").

Tellingly, defendants do not cite a single decision from any federal court that supposedly conflicts with the *en banc* reasoning in its *Heck* analysis. Instead, petitioners attempt to construct a theory that respondent, because of his guilty plea, must be found to have admitted all facts which *might* have been introduced at a criminal trial and which *might* have formed the basis for a criminal conviction even where a conviction could have been based on several different facts.[3] However, *Heck* applies only when a subsequent civil rights action "*necessarily* impl[icates]" a prior state conviction. Here, petitioners could not establish that respondent's § 1983 lawsuit "necessarily impl[ies]" that his prior conviction was invalid since – as petitioners admitted, see Pet. App. 11 – respondent's § 148 violation occurred *before* any officer used force. Thus, *Heck* did not preclude this lawsuit.[4]

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[3] Petitioners' theory is heavily dependent on an analysis of California law, not federal civil rights principles. This Court ordinarily defers to the Circuit Courts on questions of state law. This is yet another reason why this case is an inappropriate candidate for review in this Court.

[4] For similar reasons petitioners' reliance on *Susag v. City of Lake Forest*, 94 Cal. App. 4th 1401 (2002) is misplaced. Unlike the unsuccessful § 1983 *Susag* plaintiff, here Mr. Smith presented evidence that the officers arrested him for violating Cal. Penal Code § 148 *before* any officer used any force. Pet. App. 11 n.3 (*quoting* Quinn's deposition testimony wherein he admits Mr. Smith violated § 148 by disobeying the officers commands, all

Petitioners' floodgates argument, Pet. App. 13, is demonstrably false. Ninth Circuit law pre-*Heck* allowed a § 1983 action notwithstanding a § 148 conviction unless it could be shown that the lawfulness of the officer's use of force was adjudicated in the criminal proceedings. *Hernandez v. City of Los Angeles*, 624 F.2d 935, 937-38 (9th Cir. 1980). There is no evidence of any flood of cases arising because of *Hernandez* and the decision below will not cause one either.

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of which, per Quinn, occurred before any officer used force). 94 Cal. App. 4th at 1410 (*Susag* plaintiff failed to present "evidence of excessive force [which] would not necessarily imply the invalidity of his conviction.").

II. THE *EN BANC* DECISION IMPLEMENTS *GRAHAM V. CONNOR* AND DOES NOT REQUIRE OFFICERS TO ADOPT THE LEAST INTRUSIVE MEANS OF SUBDUING A SUSPECT.

Contrary to petitioners' suggestion, this Court in *Graham v. Connor*, 490 U.S. 386 (1989) did not limit the objective reasonableness test to just three factors (severity of crime, immediacy of threat, resisting or evading arrest). While the Court mentioned these factors, the Court was careful to note that its list was not exclusive; the factfinder must pay "careful attention to the facts and circumstances of each particular case" while considering the " 'totality of the circumstances.' " 490 U.S. at 396; *see also Fikes v. Cleghorn*, 47 F.3d 1011, 1013-14 (9th Cir. 1995) ("[t]he three factors the Court [in *Graham*] listed illustrate how the jury could address the question of excessive force under a Fourth Amendment test, but they do not constitute the exclusive test for whether force is excessive.").

The *en banc* decision did *not* say that any time one can hypothesize a less-injurious means of capturing a suspect, the means actually used become unreasonable. Rather, the decision noted that among the factors to be considered is whether the force used was necessary. That is, could the police have accomplished their objective by simply grabbing Tom Smith, rather than by siccing a dog on him? 394 F.3d at 703-04 (Pet. App. 22-23). The decision's discussion of this point was part and parcel of its overall analysis using the *Graham* factors. Equally clear, the decision's holding did not turn on this factor.

The *en banc* decision did not err in allowing the district court on remand to consider whether lesser intrusive means were available to the officers as part of the *Graham* totality of the circumstances analysis, nor was it error for the court of appeals to allow evidence of accepted law enforcement

standards, including the policies of the Hemet Police Department.[5] Pet. App. 22-23. In *Graham*, this Court directs the factfinder's inquiry to include *all* the facts and circumstances relating to a use of police force. 490 U.S. at 396. Those facts and circumstances include whether the force used was reasonably necessary to accomplish the law enforcement objective.

The *en banc* decision's discussion of alternative methods of capture is neither novel nor surprising. Decisions by this Court recognize, as one factor bearing upon reasonableness, the intrusiveness of a particular seizure and the necessity for the means employed. While not determinative, a seizure's intrusiveness and whether it could be avoided consistent with law enforcement interests, are obviously relevant to the totality of circumstances. In short, they are not, as petitioners argue, irrelevant.

In *Illinois v. McArthur*, 531 U.S. 326 (2001), the Court upheld police conduct that prevented a man from entering his home while the police obtained a search warrant: "Temporarily keeping a person from entering his home, a consequence whenever police stop a person on the street, is considerably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search." 531 U.S. at 336.

Similarly, in *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), the Court upheld a search by a dog walking around a car because it was "much less intrusive than a typical

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[5] This Court has frequently referred to similar standards in considering the constitutionality of police or law enforcement practices. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (relying in part on Department of Corrections regulation, Court concludes that guards' conduct violated "clearly established statutory or constitutional rights"); *Tennessee v. Garner*, 471 U.S. 1, 19 (1985) (Court finds additional support for its holding by noting "[a]ctual departmental policies" were in agreement with the Court's conclusion.).

search," whereas in *Bond v. United States*, 529 U.S. 334 (2000), the Court found the seizure unreasonable because, *inter alia*, "Physically invasive inspection is simply more intrusive than purely visual inspection." 529 U.S. at 337.

In explaining its decision in *Schmerber v. California*, 384 U.S. 757 (1966), the Court in *Winston v. Lee*, 470 U.S. 753 (1985), stated that "[t]he search was not more intrusive than reasonably necessary to accomplish its goals." 470 U.S. at 759. Or as the Court noted in *United States v. Place*, 462 U.S. 696, 705 (1983), "seizures . . . vary in intrusiveness"; thus, "some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure . . ."

These decisions' rationale affirm that a seizure conducted in a manner which unnecessarily causes injury *may* violate the Fourth Amendment regardless of whether the seizure itself may be justified. Nearly 40 years ago the President's Commission on Law Enforcement made the same point: "Officers should not be permitted to [use deadly force] when lesser force could be used [or] when the officer believes that the suspect can be apprehended reasonably soon thereafter without the use of deadly force." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 189 (1967).

The *en banc* decision does not, as petitioners claim, enact a new substantive standard governing the reasonableness of the use of force. Police officers do not have to demonstrate that they used only the least intrusive means to effect an arrest. The decision merely finds that less injurious methods of capture may be a factor, among others, appropriately considered in the *Graham v. Connor* calculus.

IV. THE *EN BANC* DECISION BRINGS THE NINTH CIRCUIT IN LINE WITH OTHER CIRCUITS AND LAW ENFORCEMENT ON THE DEFINITION OF DEADLY FORCE.

In *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1997), a Ninth Circuit panel defined deadly force to require a high likelihood of *death*; force likely to cause serious injury but unlikely to *kill* (that is, less than 50/50 probability of death) was not deadly. 139 F.3d 661, 663. In reaching this conclusion the panel acknowledged its definition was contrary to that used by other circuits ("Other circuits do seem to have adopted the [death or serious injury] definition of deadly force . . ." 139 F.3d at 662). Not acknowledged by that panel was that its definition was also contrary to that used by *law enforcement.*

In overruling *Vera Cruz* and holding that force which creates "a substantial risk of causing death or serious bodily injury" is deadly, 394 F.3d at 693 (Pet. App. 2-3), the *en banc* decision charts no new direction on the issue of "deadly force" in § 1983 actions. Instead, the *en banc* decision brought the Ninth Circuit in line with the other circuits which have considered the question.[6]

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[6] *See, e.g., Gutierrez v. City of San Antonio*, 139 F. 3d 441, 446 (5th Cir. 1998) (deadly force "creates a substantial risk of death or serious bodily injury"); *Estate of Phillips v. City of Milwaukee*, 123 F. 3d 586, 593 (7th Cir. 1997) (same); *In re City of Philadelphia Litigation*, 49 F.3d 945, 966 (3rd Cir. 1995) (same); *Ryder v. City of Topeka*, 814 F. 2d 1412, 1416 n.11 (10th Cir. 1987) (same); *Robinette v. Barnes*, 854 F. 2d 909, 912 (6th Cir. 1988) (same); *Pruitt v. City of Montgomery*, 771 F. 2d 1475, 1479 n.10 (11th Cir. 1985) (same); *Mattis v. Schnarr*, 547 F. 2d 1007, 1009 n.2 (8th Cir. 1976) (*en banc*) (same), *vacated as moot sub nom., Ashcroft v. Mattis*, 431 U.S. 171 (1977).

Petitioners' argument that the Eight Circuit "has expressly adopted the Ninth Circuit's" *Vera Cruz* definition, Pet. 27, is wrong. While the Eighth Circuit panel in *Kuha v. City of Minnetonka*, 365 F.3d 590, 598 n.3 (8th Cir. 2004), stated it found *Vera Cruz's* reasoning "persuasive," the statement was dicta – the panel concluded that the dog attack at issue was not deadly force even using the death or serious injury definition. Morever,

Conspicuously omitted from petitioner's argument is any challenge to this statement in the *en banc* decision:

> Equally important for this case, [the deadly force definition the court adopted] is the definition that California and the Hemet Police Department use. Adopting the common definition of deadly force should impose no more of a burden on law enforcement officials than already exists throughout the nation-- a burden that most law enforcement officials have voluntarily chosen to impose upon themselves.

394 F.3d at 706 (Pet. App. 28).

Not only do petitioners ignore this statement, without expressly saying so they argue as if the *en banc* decision forces them to adopt a definition they and law enforcement reject. The truth is as stated by the *en banc* decision. Law enforcement generally, and the Hemet Police Department in particular, define deadly force to include force likely to cause serious injury:

> • "**Deadly force** is the use of any force that is likely to cause death or serious bodily injury." Attachment B, United States Attorney General October 17, 1995 Memorandum on Resolution 14;
>
> • "There is general agreement [among police agencies] that the term [deadly force] means force reasonably capable of causing death or great bodily harm." W. GELLER & M. SCOTT, DEADLY FORCE: WHAT WE KNOW, 23 (Police

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inexcusably for a 3 judge circuit decision bound by an earlier *en banc* decision, *Kuba* made no mention of the earlier and contrary result reached *en banc* in *Mattis v. Schnarr, supra.*

Executive Research Forum 1992) ("DEADLY FORCE");

- The Intentional Association of Chiefs of Police ("IACP") in its Model Policy for the use of force, deadly and non-deadly, defines "deadly force" as "[a]ny use of force that is likely to cause death or *serious bodily harm*." DEADLY FORCE, *supra*, at 478 (emphasis added);

- Petitioner Hemet Police Department defines deadly force as "any force which has a reasonably likelihood of causing death *or serious injury*" [emphasis added]. Hemet General Order No. U-102 ¶4(D); 394 F.3d at 706 (Pet. App. 28).

VI. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER THE USE OF POLICE DOGS CAN AMOUNT TO "DEADLY FORCE"; REGARDLESS THE ISSUE IS NOT NOW BEFORE THIS COURT.

The *en banc* decision does not hold that the use of the police dog in this case or any other constituted "deadly force." As the decision stated:

> We need not here determine whether the use of a police dog to subdue a suspect constitutes deadly force generally or the circumstances under which such use might constitute such force. Having announced the definition of "deadly force" we leave to the district court the first opportunity to apply the concept to the facts of this case. We note only that while we have not in any of our prior cases

> found that the use of police dogs constituted deadly force, we have never stated that the use of such dogs cannot constitute such force.

394 F.3d at 707 (Pet. App. 30).

That conclusion is unsurprising. Whether a particular implement is "deadly" or not depends on the facts showing the manner of use and risk of serious injury or death. So while the Sixth Circuit in *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) concluded that the police dog attack at issue did not constitute "deadly force," it did so expressly on the *absence* of evidence showing likely serious injuries. 854 F.2d at 912. Under different evidence, the Sixth Circuit observed, the factfinder may conclude otherwise, *i.e.*, given the evidence the police dog attack may be deadly force. *Id.*, at 913. *See also Marley v. City of Allentown*, 774 F. Supp. 343, 345-46 (E.D. Pa. 1991) (police dog attack; jury allowed to determine whether police dog attack was deadly force), *aff'd without opinion*, 961 F.2d 1567 (3d Cir. 1991); *Mathis v. Parks*, 741 F. Supp. 567, 572 & n.3 (E.D.N.C. 1990) (court found a full force blow to the abdomen using the knee was "deadly force" because such force may "cause serious bodily harm").

Because whether a dog or other device constitutes deadly force is a fact-based inquiry (*i.e.*, what is the risk of death or serious injury?), there must be a factual record addressing the issue. Here, the trial court never reached this issue for that court granted judgment based solely on *Heck* grounds. Thus, the *en banc* decision wisely remanded to have the district court consider this issue in the first instance, and make the necessary factual findings. That, respondent submits, is the appropriate way to proceed. This Court should wait until after the question of whether the use of a police dog may

constitutes deadly force is presented with a full factual record.[7] It is possible that this case may present that opportunity in the future but not in its current procedural posture.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: May 16, 2005

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AND

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[7] Some years ago the medical profession noted the alarming increase of serious injuries from police dog attacks. Snyder and Pentecost, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, ANNALS OF EMERGENCY MEDICINE 983 (September, 1990) (finding that police dog attacks were increasing and causing injuries far more serious than that caused by ordinary dogs and comparable in some ways to extremity injuries caused by gunshot or knife attacks).